

Newspaper and Mail Deliverers' Union of New York and Vicinity and Daily News, L.P. and New York Mailers' Union No. 6, Printing, Publishing and Media Workers Sector of the Communications Workers of America, AFL-CIO.
Case 29-CD-456

July 10, 1996

**DECISION AND DETERMINATION OF
DISPUTE**

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

The charge in this Section 10(k) proceeding was filed July 18, 1995, alleging that the Respondent, Newspaper and Mail Deliverers' Union of New York and Vicinity (NMDU) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by New York Mailers' Union No. 6, Printing, Publishing and Media Workers Sector of the Communications Workers of America, AFL-CIO (Mailers' Union). The hearing was held December 18, 1995, before Hearing Officer Ariella Bernstein, and March 27 and 28, 1996, before Hearing Officer Leslie A. Breeding.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officers' rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Daily News, L.P., with its office and principal place of business in New York, New York, and with offices located in Kearny, New Jersey; Brooklyn, New York; and Jersey City, New Jersey, is engaged in the publication and distribution of a newspaper. During the 12 months preceding the hearing, the Company derived \$200,000 in gross revenues and had membership in or subscription to interstate news services or advertisements of nationally sold products, and has purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of New York. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that both NMDU and the Mailers' Union are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer publishes and distributes a newspaper called the Daily News, which it has owned since 1993.

The Employer has collective-bargaining relationships with NMDU and the Mailers' Union.

The Employer is planning to move its production and distribution departments to a new facility in Jersey City, New Jersey, about July 1996. The Employer has purchased a new machine called a "Rollpack," which it plans to include in a "Totalizing System," a completely automated process of moving newspapers from the presses, packaging them for customers, and delivering the bundles at the truck-loading docks.

The Rollpack is one of two types of machines designed to receive loose newspapers. The other, a variable stacker, is currently operated by employees represented by the Mailers' Union. The variable stacker stacks the night's standard bundle size, e.g., 50 papers, depending on the size of that day's edition. The variable stacker can also stack "odds" (bundles of less than the standard count that are added to a delivery to fill the balance of a customer's order), but it cannot produce bundles smaller than 15 papers. The Rollpack can bundle an "odd" from one paper to whatever number of papers the customer order requires.

When newspapers emerge from the printing presses, they move to the stacking machines in the mailroom. Handling the loose papers prior to their arrival at the stacking machines and operating the stacking machines are within the undisputed jurisdiction of the Mailers' Union. After the papers emerge from the stacking machine, the stack of papers is conveyed on a belt to the tying machines. The NMDU and the Mailers' Union share jurisdiction over the tying machines.¹ A wrapper is put on top of the bundle before it is tied. Operating the tying machine includes pushing a button to turn the machine on or off, threading a spool of plastic strap into the machine when the supply runs out or breaks, and reaching in to clear the machine when it is clogged. Employees represented by both Unions make up the odd bundles by counting the requisite number of newspapers, placing a wrapper on top, and tying the odd bundle with rope. The Rollpack will automatically count, label, bundle, and wrap the odd bundles.

On July 12, 1995, at its Brooklyn facility, the Employer attempted a trial run of the Rollpack machine. Employees represented by the Mailers' Union were to bring the papers to the Rollpack machine, and the vendor was to operate the machine. NMDU Business Agent James DeMarzo asked James Brill, the Employer's vice president of distribution, if employees rep-

¹The parties stipulated that the NMDU has jurisdiction over the tying machines in the Brooklyn plant for newspapers destined for direct and/or retail routes, and the Mailers' Union has jurisdiction when the papers are destined for Westchester, and for country runs, or so-called National runs. At Kearny, New Jersey, NMDU has jurisdiction over the tying machines for retail and direct routes, except for Bergen County, for which the machines are in the Mailers' Union jurisdiction. Employees represented by the Mailers' Union also tie the papers for the wholesale routes in Kearny.

resented by NMDU were to operate the Rollpack machine. When Brill told DeMarzo that the machine's vendor would be operating the machine, DeMarzo sat on the loading dock conveyor belt and prevented the loading of papers. DeMarzo stated that the work stoppage would continue unless employees represented by NMDU manned the Rollpack machine during the test. Because of the work stoppage, the Employer was unable to deliver 7628 newspapers that day. The Employer participated with NMDU in a teleconference arbitration which resulted in an arbitration award finding that the work stoppage violated the parties' agreement and ordering NMDU to cease such conduct.

B. Work in Dispute

The disputed work involves the tending/operation of a new automated Rollpack machine which counts, labels, bundles, and wraps odd lots of newspapers.

C. Contentions of the Parties

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. The Employer contends that the Rollpack machine is an automatic stacker and that it should be run by the employees represented by the Mailers' Union, who have undisputed jurisdiction over the stackers. The Employer argues that the work in dispute should be awarded to employees represented by the Mailers' Union based on their collective-bargaining agreement, economy and efficiency of operation, employer preference, and prior Board decisions.²

NMDU contends that currently and historically the drivers make up all but a minuscule amount of the "odds," i.e., they count and separate the papers, prepare a wrapper, tie the papers together in a bundle, and on inclement days they wrap the bundle in a protective covering. The Rollpack machine, a new mechanical device, has been introduced to perform all of these functions now performed by employees represented by the NMDU and should be operated exclusively by those employees.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim and that there are competing claims to disputed work between rival groups of employees.

²Decisions cited by the Employer address various facets of automation in the newspaper industry and other disputes between the Unions involved in this proceeding, but they do not involve the same type of work that is in dispute here.

All parties stipulated that the NMDU and the Mailers' Union both claim the work in dispute. As noted above, during a trial run employees represented by the Mailers' Union were to have loaded the newspapers into the Rollpack and the vendor was to have operated the machine. When NMDU Business Agent DeMarzo was told that employees represented by NMDU would not be manning the Rollpack, he sat on the loading dock conveyor belt and prevented the delivery of over 7000 newspapers. We conclude that there are active competing claims to the disputed work between rival groups of employees, and we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. The parties stipulated that there is no agreed-on method for voluntary adjustment of the work dispute which would bind all the parties. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

There is no Board certification involving the work in dispute. The Employer has collective-bargaining agreements with both Unions which arguably cover the work in dispute. Article III of the NMDU agreement provides that it has jurisdiction over employees "writing wrappers, handling, bagging and tying, by hand or machine, all papers for New York City delivery." Article VII of the Mailers' Union agreement gives it jurisdiction over "work presently performed by employees within the bargaining unit and new or additional work that is substantially the same or related." This factor does not favor awarding the work in dispute to either group of employees.

2. Employer preference

The Employer contends that the Rollpack machine is really an automated stacker which also labels and bundles the papers. The Employer prefers that the work in dispute be done by employees who are represented by the Mailers' Union who have undisputed jurisdiction over the stackers. This factor favors awarding the work

in dispute to employees represented by the Mailers' Union.

3. Area and industry practice and employer past practice

Although the Rollpack machine (which assembles, bundles, labels, and seals the papers in plastic) is widely used overseas, there are none in use in the United States. Thus, there is no area or industry practice or employer past practice regarding the operation of this machine.

Previously, at the Daily News, the work the Rollpack machine performs was split between the two groups of employees. The parties stipulated that employees represented by the Mailers' Union have jurisdiction over handling loose papers from the press room up until the tying machine. This includes the operation of the stacking machine and, at least in the Brooklyn facility, includes placing a bottom wrap on the papers after they leave the stacking machine. As described above (at fn. 1), employees represented by the NMDU and those represented by the Mailers' Union share jurisdiction over the operation of the tying machines. The employees who are responsible for tying the bundle place a top wrapper on it before it is tied.

As indicated above, the "odds," which are now manually counted and tied with rope, are handled by both groups of employees, although employees represented by the NMDU tie up more odd bundles than do employees represented by the Mailers' Union.³ Drivers are supplied with plastic bags to protect the "odds" from the elements.

Similarly, evidence of area practice regarding the tying machines demonstrates that at other newspapers that work is split between the groups of employees.⁴ At the New York Times facility in Edison, New Jersey, and at the New York Star Ledger, employees represented by the Mailers' Union operate the tying machines. At the New York Times facility in New York City, about two-thirds of the tying machine work is done by employees represented by the Mailers' Union and one-third by employees represented by the NMDU.

Because the area and industry and employer past practice are either nonexistent (as to operation of the Rollpack machine) or mixed (as to the work that will be performed by the machine), these factors do not favor awarding the work in dispute to either group of employees.

³The record is not completely clear as to what proportion of the total the "odds" represent or as to what proportion of the "odds" each group of employees counts and ties.

⁴There is no evidence of area or industry practice in regard to the other components of the Rollpack function.

4. Relative skills

Neither group of employees has had direct experience with operating the Rollpack machine. However, the operation of the Rollpack generally requires pushing a button to start the machine and loading labels and wrap every other day. It does not require any specialized education or training. This factor does not favor awarding the work in dispute to either group of employees.

5. Economy and efficiency of operations

The record shows that after the Rollpack is installed at the Employer's new facility as part of the totalizing system, the Rollpack will be located in the mailroom where employees represented by the Mailers' Union will be present operating the nearby stacking machines. Employees represented by the NMDU, however, will be located outside the mailroom working on the loading dock. Because the rollpack machine requires only intermittent attention, it would be more disruptive to the Employer's operations for an NMDU-represented employee to interrupt his truck-loading duties outside in order to come in to oversee the machine than for an employee working nearby to attend it. Therefore, the record establishes that it would be more economical and efficient to assign the operation of the new Rollpack to Mailers' Union employees who will still be present in the mailroom and employed as operators for the variable stacking machines. Consequently, this factor favors awarding the work in dispute to employees represented by the Mailers' Union.

Conclusion

After considering all the relevant factors, we conclude that employees represented by New York Mailers' Union No. 6, Printing, Publishing and Media Workers Sector of the Communications Workers of America, AFL-CIO are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by the Mailers' Union, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Daily News, L.P. represented by New York Mailers' Union No. 6, Printing, Publishing and Media Workers Sector of the Communications Workers of America, AFL-CIO are entitled to operate the Employer's Rollpack machine.

2. Newspaper and Mail Deliverers' Union of New York and Vicinity is not entitled by means proscribed

by Section 8(b)(4)(D) of the Act to force Daily News, L.P. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Newspaper and Mail Deliverers' Union of New York and Vicinity

shall notify the Regional Director for Region 29 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.